

Court of Appeal No. 35167-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ALFREDO L. SILVA

Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT

Cause No. 16-1-00696-8

The Honorable David D. Estudillo

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by allowing the State to rely on evidence that it failed to disclose pursuant to CrR 4.7 and Mr. Silva's demands for discovery.
2. The trial court committed reversible error by denying Mr. Silva's request for a self-defense jury instruction.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. At trial, the State produced a section record for Mr. Silva that was subject to disclosure pursuant to CrR 4.7 and Mr. Silva's discovery request. Did the court abuse its discretion by allowing in this prejudicial information to prove an element of the crime?
2. Whether the trial court abused its discretion by determining that Mr. Silva did not present sufficient evidence to support a self-defense jury instruction.

B. STATEMENT OF THE CASE

Alfredo Silva was charged with Assault in the Fourth Degree and prison riot stemming from an incident with Joshua Avalos that occurred at a correctional institution. (CP 1-4)

Mr. Silva and Mr. Avalos were housed in the same dorm at Grant County Jail, but in separate cells. (RP 65-67) Mr. Silva shared a cell with Miguel Lopez in cell #4. (RP 66, 96) Mr. Avalos shared a cell with Rafael Ochoa in cell #2. (RP 52, 93, 96) In Mr. Silva's and Mr. Avalos's dorm, Dorm B, there are eleven separate cells. (RP 65) Inmates are kept in their cells 23 hours a day and allowed one hour out on a rotating schedule. (RP 52, 65) Inmates who are out can walk around and talk to people who are housed in their dorm. (RP 65) It is also possible for the inmates to talk to each other or pass notes with the cell doors closed. (RP 126-27) Conversations between inmates inside the dorm are not recorded. (RP 127-28)

Officer Justin Grubb was alone in dorm B at the time of the incident. (RP 91, 92) Normally, the jail staffs at least two guards are in the upper control room. (RP 88-89) There were no other guards in the control room to assist Officer Grubb with monitoring or transporting inmates. (RP 91)

At the time of the incident, it was Mr. Avalos's and Mr. Ochoa's "hour out." (RP 120) A video of Dorm B showed Mr. Avalos walking by Mr. Silva's cell and making hand gestures. (Exhibit P12, RP 205) Later, Mr. Avalos can be seen sitting in his cell with the door partially closed. (Exhibit P12, RP 72, 121)

Meanwhile, Mr. Lopez was returning from court. (RP 94) Officer Grubb was responsible for escorting Mr. Lopez, back to his cell where Mr. Silva was located. (RP 73) Officer Grubb chose not to lock Mr. Avalos or Mr. Ochoa back into their cell prior to bringing in Mr. Lopez. (RP 112) Mr. Avalos was in his cell with the door open. (RP 121)

Officer Grubb asked Mr. Lopez twice if he had any problems with Mr. Avalos and Mr. Ochoa. (RP 97) Officer Grubb did this because he was concerned that a fight might break out. (RP 97) Both times, Mr. Lopez did not say anything but only rolled his eyes. (RP 97, 120)

Officer Grubb removed Mr. Lopez's restraints and brought him into dorm B. (RP 120) When the two entered the dorm, Mr. Avalos stepped out of his cell. (Exhibit P12, RP 121) Officer Grubb noticed Mr. Avalos standing in a "bladed stance," which Officer Grubb recognized as a major pre-attack indicator. (RP 132) He knew it to mean that there was going to be a physical altercation. (RP 132)

Officer Grubb opened the door to Mr. Silva's cell. (RP 122) Mr. Silva stepped forward as if to ask a question. (RP 122) He then ran out of the cell and toward Mr. Avalos. (RP 124) A struggle ensued. (RP 12) Officer Grubb got between the men and tried to pull them apart. (RP 124) Mr. Avalos was striking Mr. Silva with no indication of pulling away. (RP 133) Mr. Avalos struck Officer Grubb several times. (RP 134) Despite the interference from Mr. Avalos's punches, Officer Grubb was able to incapacitate Mr. Silva with a Taser and ended the fight. (RP 124)

Both Mr. Silva and Mr. Avalos were charged with Prison Riot and Assault in the Fourth Degree. (CP 1-4) Mr. Silva's and Mr. Avalos's trials were joined. (RP 4)

Prior to trial, in his demand for discovery, Mr. Silva requested all discovery required by court rule, as well as Grant County Jail reports. (CP 92) In his supplemental motion for discovery, Mr. Silva requested from the State his criminal history and all law enforcement reports. (CP 93) The State's Compliance with Omnibus Order and CrR 4.7(a), it responded that it had produced any applicable documents, and records of prior convictions of Mr. Silva. (CP 94)

At trial, Mr. Silva argued that he acted in self-defense. (RP 99) Mr. Silva's position was that when Officer Grubb opened his cell while Mr.

Avalos was out, he was put in a position where he was going to be attacked or he was going to have to attack. (RP 99)

The State sought to introduce evidence through Officer Grubb that Mr. Silva had previously been sanctioned for fighting in jail. (RP 135) The State obtained the Grant County inmate sanction record for Mr. Silva, dated March 29, 2012, and presented it at trial. (RP 135, 155) The State sought to introduce this as a business record. (RP 135) The State admitted that the evidence applied directly to an element of the crime, specifically the jail's order not to fight. (RP 137) The State had not provided Mr. Silva with this infraction record or notice of the record. (RP 135)

Mr. Silva objected because the State failed to disclose the information and it violated the motions in limine that prohibited discussion of contact with law enforcement and detentions pertaining to incidents that occurred. (RP 135)

The court sustained the objection because the infraction record was not disclosed prior to trial and it was evidence of prior bad acts. (RP 138) However, the court allowed the State to identify that such a policy existed. (RP 138) Mr. Silva objected again, due to relevance and the court's earlier inconsistent decision regarding admission of a different jail's policy. (RP 138-39) The court overruled the objection because the State's policy addressed an element of the offense. (RP 139)

Officer Grubb testified that fighting was against jail policy and the inmates have access to a handbook that describes all of the rules. (RP 141) Mr. Silva's counsel asked Officer Grubb if he advised Mr. Silva of the rules when he came into jail, to which he responded no. (RP 145) Counsel did not ask about a rule regarding fighting. (RP 144)

The State renewed its request to introduce evidence that Mr. Silva had been advised of the jail's policy against fighting. It argued that Mr. Silva opened the door by asking Officer Grubb if anyone advised Mr. Silva of this policy. (RP 149-50)

Mr. Silva objected again, repeatedly, and on several basis. He argued that he did not "open the door"; his questioning revolved around issuance of the handbook. (RP 152) Mr. Silva also maintained that the "opening the door" argument was unnecessary for the court to review. (RP 155) The State was using the information to establish an element and it could have presented it in its case in chief. (RP 155)

He renewed his objection to admission of the sanction record as a business record. Mr. Silva also argued that Officer Grubb was being allowed to refresh his memory based on hearsay upon hearsay, since he did not give the advisement, was not present when the records were made or issue the sanction, and was not the record keeper. (RP 160-61) He also argued that the sanction was not the original, and that the sanction was not

signed by Mr. Silva or a law enforcement officer. (RP 162) The court did not change its decision. (RP 160)

Mainly, Mr. Silva objected again based on the non-disclosure of the evidence. (RP 154, 157) Mr. Silva argued that this was a discovery violation. (RP 154) He maintained that he was entitled to business records from the State, as part of discovery. (RP 154) He also argued that the late disclosure was prejudicial for several reasons. (RP 154) First, defense counsel did not have the opportunity to review the sanction with Mr. Silva. (RP 157) Second, the trial was already into two or three levels of redirect and recross, and the State was just now bringing in this information. (RP 154) Third, crucial parts of the trial process had passed, like calling witnesses and jury selection, and knowledge of the sanction could have an effect on how Mr. Silva proceeded. (RP 157-59) Finally, defense counsel noted that his trial strategy and closing argument would now need to be modified, and that he could not do it in the 15 minutes that the court was giving him to look at the sanction report. (RP 158)

Mr. Silva asked for a continuance, or alternatively, because of scheduling, a mistrial. (RP 156- 57) The trial court refused to grant either. Instead, the court extended the recess to one hour for Mr. Silva's counsel to review the withheld sanction report with Mr. Silva. (RP 158) This was

the first time Mr. Silva and his counsel saw the record, and the State did not provide Mr. Silva with his own copy. (RP 169)

After reviewing the sanction information, Mr. Silva renewed all his objections. He explained that there were two incidents referenced on the sanction, and the second one resulted in criminal charges. (RP 163) Counsel argued that this incorporated criminal history and was exactly what was addressed in the motion in limine, and it should have been disclosed. (RP 163) The same disclosure was required even if the evidence was admitted as a business record. (RP 164) Additionally, the document did not indicate whether Mr. Silva was warned not to fight. (RP 167)

Despite its earlier decision, the court overruled Mr. Silva's objection, and allowed the State to ask Officer Grubb whether Mr. Silva was informed before that fighting was against policy, based on the Grant County Jail sanction record. (RP 155) The trial court allowed Officer Grubb to provide the foundation for the business record. Through the business record, the court allowed Officer Grubb to testify that Mr. Silva was sanctioned, and as a result of the sanction, was informed of the jail's policy against fighting. (RP 153, 165-66)

The State asked Officer Grubb, "[D]id you review jail records and fighting incidents where Mr. Silva was informed about the no fighting policy?" (RP 177) Officer Grubb responded that he did. (RP 177)

After closing, Mr. Silva submitted self-defense jury instructions to the court. (RP 181, 202, CP 21-35) Mr. Silva argued that a self-defense instruction was warranted because the video showed that prior to the fight, Mr. Avalos walked by Mr. Silva's cell and made hand gestures that could be interpreted as hand gestures between the two men. (RP 205) Then, Mr. Avalos can be seen sitting in his cell waiting, as if he is geared up for a fight. (RP 202) He comes out of his cell at the same moment as Mr. Silva's cellmate was brought back. (RP 202) Officer Grubb testified that Mr. Avalos was in pre-attack mode. (RP 203) Additionally, there was a question as to who hit first and Mr. Silva's advance toward Mr. Avalos does not prove he was the assaulter. (RP 203) Mr. Silva argued that this was sufficient evidence to warrant an instruction. (RP 203)

The court denied the self-defense instruction, finding no basis in the facts to support a theory of self-defense. (RP 204-05) The jury found Mr. Silva guilty on both counts. (RP 64, 65)

The trial court erred by allowing the State to use information of Mr. Silva's past sanction at trial, and this information prejudiced the outcome of trial. Furthermore, the trial court erred by not allowing Mr. Silva to present a self-defense instruction.

C. ARGUMENT

1. The trial court's decision to allow the State to rely on a jail sanction record that the State did not disclose in discovery prejudiced the outcome of Mr. Silva's trial

CrR 4.7 governs criminal discovery. *State v. Pawlyk*, 115 Wn.2d 457, 471, 800 P.2d 338 (1990). The scope of criminal discovery is within the trial court's discretion. A trial court's discovery decision will not be disturbed absent a manifest abuse of that discretion. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Abuse of discretion occurs if the trial court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An error is not reversible unless it materially affects the trial's outcome. *State v. Linden*, 89 Wn .App. 184, 189–90, 947 P.2d 1284 (1997).

CrR 4.7 requires a prosecutor to disclose to the defendant, no later than the omnibus hearing, any documents, papers, photographs, or other objects that may be used in the prosecutor's case. CrR 4.7(a)(1)(v). This disclosure is a continuing obligation on the State. CrR 4.7(h)(2). The State's duty under CrR 4.7 applies to evidence "which the rules oblige it to disclose," ... "whether it be considered for use in the state's case-in-chief, for rebuttal, for impeachment purposes, or in some other way." *State v. Falk*, 17 Wn. App. 905, 908, 567 P.2d 235 (1977). The State must also

disclose relevant evidence if it is reasonably possible that the evidence will be used during any phase of the trial. *State v. Dunivin*, 65 Wn. App. 728, 733, 829 P.2d 799 (1992).

“It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are ‘to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.’” *State v. Copeland*, 89 Wn. App. 492, 497, 949 P.2d 458 (1998) (quoting *State v. Dunivin*, 65 Wn. App. 728, 733, 829 P.2d 799 (1992)).

Sanctions for the prosecutor's non-compliance are set forth in CrR 4.7(h)(7)(i). If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances. CrR 4.7(h)(7)(i). A court can also order exclusion or suppression of evidence as an extraordinary remedy to be applied narrowly. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998).

The trial court has wide discretion in ruling on discovery violations and motions for a new trial. *Linden*, 89 Wn. App. at 189-90. These decisions will not be disturbed on appeal unless the court abused its discretion. *Id.* at 190. But even if the court committed an error, the appellant must demonstrate that the error was prejudicial and materially affected the trial outcome. *Id.* The potential prejudice resulting from non-compliance with the discovery rules lies in the defense's inability to properly anticipate and prepare, i.e., surprise. *State v. Brush*, 32 Wn. App. 445, 455, 648 P.2d 897 (1982).

Here, the State violated CrR 4.7 by failing to disclose Mr. Silva's sanction record from Grant County Jail. The State had the obligation under CrR 4.7(a)(1)(v) to produce the record if they intended to use it at trial. The State did intend to use it at trial, as they had it in their possession and produced it in order to prove an element of their case. Additionally, the State had an obligation to produce it as part of Mr. Silva's discovery motions. The trial court found that this was a discovery violation.

Still, the trial court abused its discretion when the trial court contradicted itself by erroneously allowing the jail sanction record to be used at trial as a foundation for Officer Grubb's testimony. The trial court allowed Officer Grubb to testify based on the undisclosed evidence that Mr. Silva had records for fighting in jail. The trial court had previously

prohibited this record from being admitted because of the discovery violation and because it was evidence of a prior bad act. The trial court did not give a tenable reason for now allowing the use of the evidence after it already ruled the evidence was not admissible due to the discovery violation and the introduction of the prior bad act.

Indeed, the trial court contradicted itself by allowing the State to use the sanction record as a foundation for Officer Grubb's testimony regarding jail records and fighting incidents involving Mr. Silva. The court had already excluded the sanction record because it referred to a prior bad act. Still, the court allowed the State to rely on the undisclosed record to present the same bad act to the jury through Officer Grubb's testimony. The result was the same. The State used the document to introduce the prior bad act to the jury. A trial court must initially presume that any evidence of prior bad acts is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The court's inconsistent decision on this matter is manifestly unreasonable.

The State's failure to disclose the jail sanction record was prejudicial to Mr. Silva. The use of this evidence was not superficial. The State used the concealed evidence to prove an element of the crime, namely that Mr. Silva acted against the commands of the institution. Mr. Silva's counsel did not have the ability to properly anticipate and prepare

for the State's use of this information, and it could have affected the way he presented his case. Also, the knowledge that the State intended to use this evidence could have led Mr. Silva to more seriously consider a plea agreement.

Moreover, the seriousness of the irregularity was significant. Allowing evidence of the prior bad act is inherently prejudicial. *State v. Lough*, 125 Wn. 2d 847, 863, 889 P.2d 487(1995). In order to admit evidence of prior bad acts under the common plan or scheme exception, the prior acts must be (1) proved by a preponderance of the evidence; (2) admitted for the purpose of showing a common plan or scheme; (3) relevant to prove an element of the crime charged; and (4) more probative than prejudicial. *Id.* at 852. Substantial probative value is needed to outweigh the potential prejudicial effect of ER 404(b) evidence. *DeVincentis*, 150 Wn.2d at 23. Mr. Silva did not have a fair opportunity to argue against the introduction of this evidence. The inherent prejudice from this information tainted the jury.

The trial court erred by not allowing the State to use the undisclosed jail sanction records. The trial court erred by not excluding this evidence. The error was prejudicial and materially affected the trial outcome. The trial court should have granted a mistrial, or at minimum a

continuance, to allow Mr. Silva to respond to the undisclosed jail sanction record.

2. Mr. Silva's reasonable belief that he was about to be injured supported his request for a self-defense jury instruction.

Under RCW 9A.36.041(1), “[a] person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” Fourth degree assault includes the intentional harmful or offensive touching of another person regardless of whether it results in physical injury. *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007).

It is a defense to the charge of assault that the force used was lawful. See *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). A person acts in self-defense when she reasonably believes that she is about to be injured and she uses no more force than necessary to prevent an offense against her person. RCW 9A.16.020(3). The standard for self-defense incorporates both subjective and objective elements. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). A defendant has the initial burden of pointing to evidence in the case “showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.” *State v. Dyson*, 90 Wn. App. 433, 438–39, 952 P.2d 1097 (1997). However, once the defendant produces some evidence,

the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.” *State v. McCreven*, 170 Wash. App. 444, 462, 284 P.3d 793 (2012). The trier of fact considers all of the facts and circumstances subjectively known to the actor and then determines what a similarly situated, reasonably prudent person would have done. *Walden*, 131 Wn.2d at 474.

Because he “is entitled to the benefit of all the evidence,” the defendant may assert self-defense even if it is “based upon facts inconsistent with his own testimony.” *State v. Callahan*, 87 Wn. App. 925, 933, 87 P.2d 676 (1997). However, “while the threshold burden of production for a self-defense instruction is low, it is not nonexistent.” *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Indeed, “an instruction on an issue or theory not supported by the evidence is improper.” *State v. Gogolin*, 45 Wn. App. 640, 643, 727 P.2d 683 (1986).

“If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion.” *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record

to support a defendant's claim of self-defense. *State v. Roberts*, 88 Wn.2d 337, 346, 562 P.2d 1259 (1977).

Here, the trial court abused its discretion by not allowing Mr. Silva's self-defense jury instruction. There was evidence to establish that Mr. Silva that he had a good faith belief in the necessity of force. First, conflict was anticipated in the jail in which he was housed, to the point where Officer Grubb asked about potential conflicts before bringing Mr. Lopez back into the cell. Second, Mr. Avalos was seen passing by Mr. Silva's cell making hand gestures, which could be perceived as threats. Third, Mr. Avalos had the rare opportunity to have physical contact with Mr. Silva based on Officer Grubb's failure to follow policy and lock Mr. Avalos in his cell before opening Mr. Silva's cell. Fourth, Officer Grubb was alone, giving Mr. Avalos the opportunity to overpower him and attack Mr. Silva. Last, at the moment when Mr. Silva's cell was to be opened, Mr. Avalos came out of his cell in bladed stance, or attack position. Even Officer Grubb recognized this position as a precursor to an attack. Based on these circumstances, Mr. Silva subjectively believed that he either needed to attack or be attacked. His fear of harm was objectively reasonable for those in a confined jail environment without adequate guard protection.

While Mr. Silva was the party to advance forward, this does not controvert a self-defense instruction. The self-defense instruction is available to someone who reasonably believes that he or she is about to be injured. RCW 9A.16.020(3). Mr. Silva had a reasonable belief that Mr. Avalos was going to assault him based on the circumstances prior to the assault. This was both subjectively and objectively reasonable.

The threshold burden of production for a self-defense instruction is low. Mr. Silva presented evidence that supports his reasonable fear of harm. The trial court abused its discretion by not presenting a self-defense instruction to the jury.

“It is reversible error to refuse to give a requested instruction when its absence prevents the defendant from presenting his or her theory of the case.” *State v. Kidd*, 57 Wn App. 95, 99, 786 P.2d 847 (1990). “It is not error, however, to reject a requested instruction when its subject matter is adequately covered in other instructions.” *Id.* The remedy for failing to give a self-defense instruction is a remand for a new trial. *In re Matter of Skjonsby*, 40 Wn. App. 541, 548, 699 P.2d 789 (1985) Here, Mr. Silva stated during trial that he was basing his case on a self-defense theory. (RP 99, 100, 013) The jury instructions did not address self-defense. Thus, the trial court’s error in failing to give the instruction results in reversal and a new trial.

D. CONCLUSION

The State committed a discovery violation and a violation of CrR 4.7 by failing to disclose Mr. Silva's jail sanction records. The trial court abused its discretion by allowing the State to rely on this evidence to establish an element of the crime. The trial court's error prejudiced Mr. Silva by allowing in evidence of prior bad acts. The trial court also committed reversible error by not submitting Mr. Silva's self-defense instruction to the jury. Remand is appropriate for a new trial.

Respectfully submitted this 6th day of October, 2017.

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The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Appellant's Opening Brief with postage paid to the indicated parties:

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